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**SEP 25 2006**

**OFFICE OF PETITIONS**

In re Application of :  
Robert T. Beierle :  
Application No. 10/607,792 : ON PETITION  
Filed: 27 June, 2003 :  
Atty Docket 03321-P0002B :

This is a decision in reference to the petition filed under 37 CFR 1.181 on 19 June, 2006, to withdraw the holding of abandonment.

This application became abandoned on 4 November, 2005, for failure to timely reply to the Office action requiring restriction and/or election mailed on 3 October, 2005, which set a one (1) month shortened statutory period for reply. No extensions of the time for reply were obtained in accordance with 37 CFR 1.136(a). Notice of Abandonment was mailed on 2 May, 2006.

Petitioner states that applicant's attorney telephoned the examiner on 9 November, 2005, and orally elected Claims 1 - 18, and asked whether an extension of time was required. Petitioner further avers that the examiner stated that "the Office would take care of it." Later, petitioner states, the examiner forgot about the call. Petitioner further asserts that the examiner left a phone message for the attorney to discuss the status of the application on 27 April, 2006.

Petitioner's argument has been carefully considered, but is not persuasive.

In this regard, 37 CFR 1.135 states:

(a) If an applicant of a patent application fails to reply within the time period provided under § 1.134 and § 1.136, the application will become abandoned unless an Office action indicates otherwise.

(b) Prosecution of an application to save it from abandonment pursuant to paragraph (a) of this section must include such complete and proper reply as the condition of the application may require...

The Office action mailed on 3 October, 2005, set a one (1) month shortened statutory period for reply. Petitioner, however, failed to timely respond to the Office action. As such, the application became abandoned for failure to timely respond to the outstanding Office action.

With regard to petitioner's assertion that the examiner "would take care of" the response, there is no showing in the written record to support that allegation. As MPEP 711.03(c) states, a delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable" due to: (A) the applicant's reliance upon oral advice from USPTO employees; or (B) the USPTO's failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action. See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985). Additionally, 37 CFR 1.2 states that the action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

While this is an unfortunate situation, the Office is nonetheless precluded from granting the requested relief. The responsibility was that of the applicant to timely submit a response to the Office action, and applicant failed so to do.<sup>1</sup>

As such, the showing of record is that the abandonment resulted from the failure to petitioner to respond to the Office action requiring restriction or election, rather than an error on the part of the USPTO.

As such the application is properly held abandoned.

The petition is DISMISSED.

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<sup>1</sup> See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985); see also In re Colombo, Inc., 33 USPQ2d 1530, 1532 (Comm'r Pat. 1994) (while the Office attempts to notify applicants of deficiencies in their responses in a manner permitting a timely correction, the Office has no obligation to notify parties of deficiencies in their responses in a manner permitting a timely correction).

However, in light of the circumstances of this case, petitioner may wish to consider filing a petition to revive under 37 C.F.R. 1.137(a). A written response to the Office action mailed on 5 October, 2005, must also be filed with any petition to revive the application.

Any request for reconsideration must be filed within **TWO (2) MONTHS** of the date of this decision.

Further correspondence with respect to this matter should be addressed as follows:

By mail:           Mail Stop Petition  
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Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3231.

  
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